

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF NEW YORK (BROOKLYN)

3 SARRI ANNE SINGER, et al,

4 Plaintiffs,

5 v.

6 BANK OF PALESTINE,

7 Defendant.

Case No. 1:19-cv-00006-ENV-
RML-1Brooklyn, New York
October 17, 2022
2:04 p.m.8 TRANSCRIPT OF TELEPHONIC HEARING
9 BEFORE THE HONORABLE ROBERT M. LEVY
10 UNITED STATES MAGISTRATE JUDGE

11 APPEARANCES:

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1 (Call to order at 2:04 p.m.)

2 THE COURT: Hello, good afternoon, this is Judge
3 Levy.

4 MR. RADINE: Good morning, Your Honor this is Mike
5 Radine for the Plaintiffs.

6 MR. BERGER: Good afternoon, Your Honor, Mitchell
7 Berger here from Squire Patton Boggs.

8 THE COURT: Okay, so we're going on the record. This
9 is docket number 19-CV-6, Singer v. Bank of Palestine.

10 Why don't we start with Plaintiffs' counsel. Bring
11 me up to date as to where we are at this point, please.

12 MR. RADINE: Sure, thank you, Your Honor. This is
13 Michael Radine, although I'll note that I'm joined by my
14 colleague, Gary Osen, who will jump in if I forget anything.

15 Again, I haven't spoken with the Court in some time,
16 so if the Court will indulge me, I'll just summarize where we
17 are in the tape recovery issue at a little bit of length
18 starting with just the background.

19 As the Court is aware, the parties have focused at
20 this stage on two systems on BOP's backup tapes, a backup of
21 BOP's SWIFT Alliance Access Database platform, which is on a
22 tape we'll call Exabyte Tape 6 and several backups of BOPs
23 legacy core banking system on several DDS tapes. And the main
24 tape there we'll call DDS Tape 23.

25 As Your Honor knows, we've been saying for months

1 that these backup files should go to an independent qualified
2 vendor to search for responsive records based on agreed upon
3 search queries, rather than rely on BOP's and its IT consultant
4 analyses, which Plaintiffs have consistently maintain were and
5 are at best erroneous.

6 Well, BOP previously persuaded the Court that the
7 ordering as to give the tapes to an independent qualified
8 vendor is premature because their own vendor Sullivan Strickler
9 had already started the process of analyzing the files from
10 these two tapes and would only need, quote, four to six weeks
11 from when work commenced in early August.

12 We're now in mid-October, some 10 weeks after early
13 August. And Sullivan Strickler has informed us on our last of
14 two IT conferences we held that it needs perhaps 10 more weeks
15 to complete even a cursory review of the tapes, although it
16 admittedly lacked the capacity to do the kind of forensic work
17 that is reasonably required to properly search the tapes.

18 Not a disparagement. We're advised that within their
19 limited core competency, they appear to be proceeding in good
20 faith.

21 But let me turn first to what Sullivan Strickler has
22 found so far, which is itself rather remarkable. And then,
23 I'll summarize why its purported search process is completely
24 insufficient.

25 So, starting with Sullivan Strickler's findings, they

1 so far confirm certain specific findings about the tape that
2 make clear that essentially every material search, I mean BOP
3 and its IT consultant, had made to this Court about the backup
4 tapes has been at best mistaken.

5 We can detail this chapter and verse in a renewed
6 motion to compel, but I'll just briefly itemize the main
7 points.

8 First, the Court will recall that BOP first insisted
9 that Exabyte Tape 6, which had the backup of the SWIFT
10 database, should be set aside because it only contained one
11 large file, regarding transactional data.

12 We said that was impossible and after we filed a
13 motion to compel, BOP conceded the tape actually contained
14 60,000 files, but now thinks the Sullivan Strickler, BOP has
15 reproduced the filing index and it contains 141,000 files.

16 Now BOP's IT expert Mr. Regard had insisted
17 repeatedly that Exabyte Tape 6 was, quote, nonrelevant because
18 all of these files were from 2005 to 2007 and were therefore
19 outside of the relevant time period.

20 Now we had said the time the backup files were
21 inherently retrospective. And that even looking at the indexes
22 they produced, well, actually, they withheld during the motion
23 to compel briefing, they were produced afterwards, even there,
24 we could see that files right on the index, archive files, were
25 dated from 2003.

1 However, Sullivan Strickler has now confirmed that
2 there are SWIFT transactional message data from 2003 and
3 presumably earlier.

4 They've also stated that the file contained no create
5 date. And that entire data column on the indices, Mr. Regard
6 advised so much, was completely erroneous and is now blank in
7 the revised index at page 6.

8 And then, next Mr. Regard had insisted that EDF Tape
9 23, this is the one that we contend had the legacy banking
10 system, quote, did not contain any identifiable backups of the
11 COBOL core banking system during the relevant period because
12 first the data was dated from 1970.

13 And second, because it only contained three KSAM or
14 COBOL utility files, quote, not data files.

15 We contend that the Court knows in our August letter
16 that the tape actually included over 3,000 KSAM files and that
17 the 1970 data was erroneous.

18 Well, unsurprisingly, Sullivan Strickler's confirmed
19 the tape includes a huge amount of KSAM files, although it is
20 still looking into how many, as well as COBOL application
21 files.

22 Now that also means the other 11 tapes we identified
23 as incremental backups Defendant's HP server likely also
24 contained KSAM files from the same system as they contained the
25 same file structures and names.

1 So in sum on the findings so far, after nearly a year
2 of shifting denials, it is now beyond doubt that Exabyte tapes
3 and the DDS tapes contain at least a kind of data that we have
4 long insisted they would.

5 So, with that, I'll just turn to the search method
6 Sullivan Strickler is using. The methodology that they've been
7 instructed to use is insufficient.

8 As we've previously advised the Court, Sullivan
9 Strickler is a competent but low level data recovery firm, not
10 a correspondent banking and payment transaction analysis firm.

11 As the Court knows, we repeatedly claim that they
12 database files at issue must be reviewed either in their native
13 applications or in modern analytical database, not just a
14 viewing program so that the data field and tables are
15 associated correctly for each record.

16 And indeed in their August 15th letter, BOP stated
17 that, quote, native applications will be used to open and
18 examine individual files to attempt to determine if they
19 contain data from the relative time period.

20 But Sullivan Strickler has informed us that it is not
21 using native applications, but its own forensic software in
22 attempts to search the files without reconstructing them using
23 database management system.

24 But these files, they're not image or text files like
25 a PDF or a Word file that can just be OCR'd and searched using

1 simple search terms.

2 The Sullivan Strickler software searches a jumbled
3 data in the files just for search terms rather than
4 reconstructing them.

5 Data is often spread out over many files or even on
6 one file, data is often (indiscernible) scattered throughout
7 the file.

8 So Sullivan Strickler confirmed their experience and
9 capabilities to us, which is why Plaintiffs wanted the
10 independent qualified vendor to do this kind of database
11 restoration work.

12 So on the specific process they're using, on Tape 6
13 with the SWIFT tape, because the search that they were using as
14 account numbers for the subject entities from the document
15 request were producing far too many hits, they used a technique
16 introduced in the (indiscernible), a search which is meant to
17 limit hits to field 59 in SWIFT messages.

18 But even if that were a method -- and I'll just say
19 field 59 would include what's sort of referred to the
20 beneficiary of a transaction.

21 But they omit the field for the originator of a
22 transaction. They omit the fact that other SWIFT messages
23 don't have field 59, have other fields for that information.
24 None of those are being searched under this method.

25 Right now, even with this insufficient method, they

1 have found over 3,800 hits, including on a transaction going
2 back to November 2003. And they still reviewing those,
3 although again, that process is not going to work because they
4 don't reconstruct the database, which they can't.

5 On the KSAM side on DDS Tape 23, they are still
6 wrangling with those files, which are encoded. And they hope
7 to complete their review by year's end.

8 But even the searching they've begun with those
9 files, we have grave doubts that they're doing it correctly.
10 So they explained to us that they're using techno (phonetic)
11 decimal decoding, but the metadata for KSAM files are also
12 decoded. Your Honor, my -- just the fact that I'm repeating
13 things that (indiscernible) here, but I'm doing my best.

14 And the contents, you get another encoding scheme.
15 So they are decoding the data using the wrong decoding schemes
16 and their search results so far have been pointless.

17 In fact, we can even see that the date that Sullivan
18 Strickler has entered in a refreshed Tape 23 index are
19 incorrect. So we can see already the result of them using the
20 wrong decoding process.

21 So in short, Sullivan Strickler will need a total of
22 some 20 weeks to partially review data -- Defendant's ESI,
23 excuse me, at the individual file level.

24 And that cannot -- I think that Sullivan Strickler
25 rather cannot and has not been instructed to analyze these

1 database files in their native applications.

2 These are just the big picture issues for our motion
3 from the smaller issues that has arisen so far and their
4 processes.

5 What we want as a result is to renew our motion to
6 compel now, that these tapes contain Defendant's ESI, go to an
7 independent vendor that is not only solely qualified to search
8 at the individual file level, but to also load the data at
9 appropriate databases and search for relevant search terms.

10 Okay, that was a lot. I will stop there for any
11 questions you might have, Your Honor.

12 THE COURT: Let me hear from Defendant's counsel.

13 MR. BERGER: Yes, Your Honor, Mitchell Berger from
14 Squire Patton Boggs for Bank of Palestine. And I listened
15 patiently to Mr. Radine, but I have to say I'm astonished. It
16 feels like they're living in an alternate reality.

17 From our standpoint, we had been successfully
18 implementing the plan that Your Honor directed in your August
19 22 order. And maybe this is the reason why Mr. Radine is going
20 on at such length.

21 The fact is we have found SWIFT records and not a
22 single one of them is jurisdictionally relevant. And perhaps
23 because they don't like the results of that search, they want
24 to take it out of our hands.

25 So let me explain what exactly is going on, see if I

1 can't respond point by point to as many things as possible that
2 Mr. Radine said.

3 First of all, as Your Honor knows from your order of
4 August 22nd, the tape review being done by Sullivan Strickler
5 was meant to focus particularly on two tapes, Exabyte Tape 6
6 and DDS Tape 23.

7 We started with Tape 6 because everybody, at least
8 while we're before the Court, everyone seems to agree that Tape
9 6 is the tape most likely to contain SWIFT records.

10 Mr. Regard, our IT expert, before we began this tape
11 review, said yeah, there are SWIFT records on that tape, but
12 they're outside the relevant time period.

13 After we were before Your Honor in August, when we,
14 you know, we're arguing over whether it was worth drilling any
15 more into these tapes. We said you know what? We'll have our
16 experts do it. We have been fully transparent about that
17 review.

18 There have been two meet and confer sessions between
19 Plaintiffs' IT expert and Sullivan Strickler. They have run
20 nearly six hours.

21 Sullivan Strickler has completed its recovery of Tape
22 6 and has now finished all of the searches.

23 Now Mr. Radine can invoke whatever jargon he wants to
24 about search methodologies, but we know that the searches are
25 working because the searches have extracted SWIFT records,

1 actual intact SWIFT records.

2 One, only one SWIFT record is from the 2003 time
3 period. And we have ruled it out as being jurisdictionally
4 relevant because that SWIFT record never went through the
5 United States. It went elsewhere.

6 There are other hits, if you will, using account
7 names and account numbers. Most of them are from 2005, 2006,
8 and 2007. There is a small number from 2004.

9 From our standpoint, all of those are
10 jurisdictionally irrelevant by way of a time frame, but the
11 proof of this particular pudding is that Sullivan Strickler's
12 methodology is working because it is extracting SWIFT records,
13 which is after all what we were supposed to do.

14 Yes, it has taken longer. When we wrote to Your
15 Honor, we said it would take at least four to six weeks.

16 We're trying to do this painstakingly and correctly.
17 We have had two meet and confers, where we've explained the
18 process.

19 And Mr. Scantling (phonetic), who is their IT expert,
20 at the last meet and confer said the methodology being used by
21 Sullivan Strickler was forensically sound.

22 Which is why I say I'm astonished to hear Mr. Radine
23 get on the call and say, you know, everything notwithstanding
24 our experts saying what you're doing is forensically sound,
25 that all that is garbage and they didn't really mean it and

1 they don't want us to continue.

2 And the reality is we are finishing the process that
3 we promised we would do. We started with the tape most likely
4 to contain SWIFT records.

5 And indeed as we predicted, it does. And indeed as
6 Mr. Regard predicted, you can see this at ECF 96, page 2, his
7 early analysis was, yes, they're a SWIFT record, but they're
8 outside the time period.

9 None of the SWIFT records that we have found is from
10 the relevant time period identified by Judge Vitaliano. Recall
11 that the last attack in this case was August of 2003.

12 And when Judge Vitaliano set the scope of discovery
13 here and referred to the relevant period, he referred to the
14 fact that the relevant period would be the period relevant to
15 the 12 terrorist attacks. That's his opinion 14.

16 Notwithstanding the fact that August 2003 was the
17 last attack, we looked at manually examined the November 2003
18 SWIFT records and we were able to rule it out because it did
19 not touch the United States.

20 Now as a reminder, and I'm sure Mr. Radine and Your
21 Honor recall this, when we received the document request that
22 started this entire process, Plaintiffs included what they said
23 was a jurisdictional limitation.

24 And I'm quoting it. Bank of Palestine need only
25 produce responsive records that reflect funds transferred that

1 cleared and/or settled through the United States.

2 We have been using that as our filter. We have been
3 using the relevant time period as our filter.

4 Even when the Plaintiffs, with Your Honor's direction
5 and leave, sent us written questions in advance of the first
6 meet and confer session, their question was what forensic
7 review process would Sullivan Strickler use for identifying
8 relevant records relating to U.S. dollar denominated cross-
9 border electronic transfers process, processed through
10 Defendant's correspondent accounts in New York between 1999 and
11 2003?

12 Well, nothing goes back to 1999. Nothing is earlier
13 than 2003. There's one SWIFT transfer in 2003.

14 Now we explained all of that. And Mr. Scantling
15 accepted that what's going on is forensically sound. It's
16 forensically sound, notwithstanding the sleight of hand about
17 native applications, because as Mr. Sullivan from Sullivan
18 Strickler explained to Plaintiffs' IT expert, their proprietary
19 review software allows them to get more granular than the
20 native applications.

21 And so, here's what we know. We know that there were
22 SWIFT records on Tape 6. We know that they were outside the
23 relevant time period.

24 And we know that we are now done with Tape 6 and no
25 relevant -- jurisdictional relevant SWIFT transfers have been

1 found.

2 That leaves Tape 23. And again, as Mr. Sullivan
3 explained at the last session, now that we have Tape 3, I'm
4 sorry, Tape 6 finished, we were focused on Tape 23.

5 Tape 23 is an entirely different haystack, because
6 we're truly looking at needles. Recall that nobody thinks that
7 Tape 23 is a SWIFT database. Tape 23 at best backs up the
8 bank's legacy COBOL-based banking system.

9 The bank has already explained under oath. Mr.
10 Regard has already explained under oath that SWIFT transfers
11 were not maintained in the COBOL banking system.

12 Rather, they were kept in a separate standalone SWIFT
13 system from which data was taken and put into an ancillary
14 table that is loaded onto the current system.

15 We searched the ancillary table. So, in other words,
16 it is highly, highly unlikely Tape 23 will contain, you know,
17 going back to first principles here, will contain cross-border
18 funds, transfers during the relevant period. At best, it backs
19 up other systems of the banks, but we are willing to see this
20 through.

21 So, yes, the one point I'll give Mr. Radine is it's
22 taking longer. But you know what? It's working and it's
23 working the way Your Honor directed, which is we are focusing
24 on these tapes. We're providing complete transparency. And we
25 should be allowed to finish it.

1 If at the end of that process, they continue not to
2 like the search results that we're getting because it doesn't
3 prove jurisdiction, that's fine.

4 They can renew their motion to compel at that point.
5 We'll have completed our review of the tapes. We can lay all
6 of this out in chapter and verse, rather than inundating the
7 Court with a bunch of sort of jargon at this stage.

8 And Your Honor can see that from our review of the
9 tapes, that it was done correctly and soundly and that it has
10 not found any jurisdictionally responsive records.

11 THE COURT: Thank you.

12 Mr. Radine, would you like to respond?

13 MR. RADINE: Sure, just briefly. So I -- you know, I
14 appreciate that Mr. Berger's not going to respond to the whole
15 suite of inaccuracies it attempted to convince the Court of all
16 this time. And that's fine.

17 Let's focus on the elements he said now. First of
18 all, as to Mr. Scantling on the technique methodologically
19 sound -- or principally sound, it won't surprise the Court to
20 hear that that's not what he said. It's not like I think the
21 methodology's wrong in the way that Mr. Scantling doesn't know
22 about.

23 What he said is that it was forensically sound when
24 he's dealing with single files in the SWIFT system to do a text
25 search, not necessarily the searches that Sullivan Strickler

1 was doing. Certainly not with a limitation to one field, one
2 type of record, which Mr. Berger chose not to address.

3 But most importantly, it does not work with this
4 database, which is made of multiple files working together.
5 So, again, I'll quote from our notes from the transcripts. I
6 agree it's forensically sound only appearing with single files.

7 The -- again, the wrong fields were not mentioned.
8 There's not been a search of Tape 6 that is even remotely
9 sufficient yet.

10 As for the native application, it's not a sleight of
11 hand. It's how this process works into something that BOP
12 offered in a letter on August 15th.

13 This line that their program is -- Sullivan
14 Strickler's is more granular is actually -- that's the sleight
15 of hand here.

16 The thing is that the does search at the byte level
17 as they say, but it doesn't reconstruct the data. Searching at
18 the byte level is pointless without the data reconstructed.

19 These are databases. It has to be in a database
20 form. And that's on page 6.

21 On the KSAM tape, they had yet to decode that data.
22 We have sent them information, which they'd asked for because
23 this is somewhat out of their wheelhouse. And that is a
24 separate issue.

25 As for the core banking system on Tape 23, this is a

1 more recent sort of tact that BOP's taking to say that it
2 doesn't matter because SWIFT transactions are not reflected on
3 the database.

4 It's a core banking system. Of course, the
5 transactions are on that database. All that BOP really means
6 is that the actual SWIFT messages are not recorded on that
7 database, but all of those transactions are.

8 You don't need a SWIFT message to prove a transaction
9 more likely than not transited to the United States. There are
10 distinct ways. And essentially the only way that BOP can move
11 U.S. dollars from one bank to another is through the United
12 States.

13 The SWIFT message is excellent proof of how that
14 happens, but it's not necessary. And so, getting that core
15 banking system, which by the way, the only system they produced
16 records for so far is necessary to complete that picture.

17 We know that the production they've made so far from
18 their banking system is incomplete, does not include the
19 transactions that we attached to our reply in our motion to
20 compel, even though Mr. Berger said that he produced all dollar
21 denominated transactions whether they are in their view local
22 or not.

23 So it remains that this process has to happen and it
24 has to happen correctly.

25 MR. BERGER: May I respond, Your Honor, briefly?

1 THE COURT: Yes.

2 MR. BERGER: So, I mean, it's a bit of a false
3 premise to say, well, the reason why when Mr. Scantling said
4 it's forensically sound that they don't really mean that
5 because that only applies to single files.

6 The fact is that's what this tape contains. It
7 contains actual SWIFT records, single files.

8 If a bank is keeping single files of SWIFT records,
9 the hypothesis, and that's all it is, and that's a nice word
10 for speculation, that this tape somehow contains different data
11 maintained in a different form.

12 In other words, that they blew up the actual SWIFT
13 record and it underwent cellular mitosis and is now kept in
14 tiny little fragments here and there such that relational
15 databases need to use, that's just not what the actual
16 examination of the tapes approval -- is approving is. It keeps
17 actual SWIFT records.

18 So yeah, they can always change the subject and say,
19 yes, it's forensically sound what you're doing for single
20 files, but it's not forensically sound for something
21 no -- nobody has any reason to think is on this file.

22 Tape 23, look, we can argue forever until the cows
23 come home on this. The fact is that we said we would complete
24 a review of Tape 23 and we're turning to that now after Tape 6.

25 We think we're right. They think they're right.

1 There's one way to find out, right? We don't have to argue
2 over the shape of the table in this negotiation.

3 We have said we would review Tape 23. We're
4 reviewing Tape 23. And then, we will know whether the
5 hypotheses that Mr. Radine is putting out there are correct.

6 Your Honor, we've been at this since May of 2021. We
7 have bent over backwards. We have provided now complete
8 transparency in six hours' worth of meet and confers.

9 We didn't have to have the second meet and confer.
10 We understood what Your Honor wanted was transparency with
11 follow up.

12 We have answered questions. We had produced
13 additional documents. They say they have additional questions
14 for us. We said, great, put them in writing, so that there's
15 no misunderstanding.

16 And this is after last week's meet and confer. We
17 haven't received those follow up questions yet. We're trying
18 to do everything that we say we would do with the tapes.

19 And the tapes is the last thing that is left. We
20 have produced an enormous amount of information, including
21 transactional spreadsheets.

22 I'm not quite sure what Mr. Radine is implying about
23 transactional spreadsheets. We produced transactional
24 spreadsheets of every dollar denominated transaction in every
25 account for any of the subject entities.

1 And further, we produced an affidavit as I told the
2 Court we would, which explains what the transaction codes are
3 and why they are not related to transfers to the United States.

4 We are really talking about the last half lap of the
5 race here. And we're nearly done. I understand they want to
6 do it all over again with an independent vendor, but they
7 provided no reason to think an independent vendor's going to
8 get different results.

9 We don't have to resolve that today. I respectfully
10 suggest that we be allowed to finish what we're doing.

11 Your Honor, you can have us come back in early
12 December and let you know where we are. And if at that point,
13 despite the forensically sound methods that our people use and
14 they want to renew the motion to compel, you know, I can't stop
15 them.

16 All I can do is explain in response that here's why
17 what we've done is correct and that enough is enough and we
18 should be allowed to renew our motion to dismiss for lack of
19 jurisdiction.

20 But frankly, we're not there yet. We should have the
21 time to finish the process.

22 THE COURT: Mr. Radine, why is that not a good idea?

23 MR. RADINE: Well, it's just this process isn't doing
24 anything. I mean, the one thing I agree it has so far
25 accomplished, it has shown that every one of these sworn

1 statements, as Mr. Berger calls them, that BOP has given the
2 Court, have been flatly untrue.

3 Right, Tape 6 doesn't have one big file of 141,000.
4 The files on that tape don't go back to 2005. They go back at
5 least to 2003.

6 The KSAM files are in fact on that tape. That's what
7 is accomplished so far.

8 And while we appreciate that and they're free to
9 continue working on it on their own, we want to move now to get
10 the process started on having this Court review whether or not
11 these tapes should go to a vendor that's qualified to do
12 database recovery and not simply the tape recovery that
13 Sullivan Strickler is doing.

14 Finding fragmentary data they found so far, which is
15 what they have found on this documents is not going to be
16 sufficient whether we give them more time or not.

17 Getting into KSAM, they're not going to be able to
18 reconstruct that database. That needs to go to a vendor and do
19 that with the further appointment.

20 As I've pointed out what they've accomplished so far
21 on that tape was getting -- was encoding language wrong and
22 have produced entirely incorrect dates.

23 So I'll put it a little different on Tape 6. If
24 they're searching the individual files, which there are on that
25 tape, they're also the database files. That means they're not

1 searching them.

2 Oracle, the (indiscernible) runs on, is a relational
3 database. It does not work just looking at it. It's sort of
4 akin to their process of just looking at the archive file on
5 Tape 6 and declaring it one giant binary file.

6 It doesn't work. And they obviously have not done
7 that search if they think that they have found everything there
8 is on that tape.

9 So we'd like to move now to get that process started
10 instead of rewarding BOP with just further delays and
11 distractions, Your Honor.

12 MR. BERGER: Your Honor, I have to respond briefly on
13 the record. First of all, every time I don't respond point by
14 point to everything that Mr. Radine says, I hear that somehow
15 we admitted or I'm dodging it. So let me be perfectly clear.

16 The statements that our people have made under oath,
17 whether it's the bank or whether it's the experts have all
18 proven to be correct as a result of the actual data analysis.

19 This is not the place for me to respond point by
20 point. When and if we get to a motion to compel, we'll do
21 that.

22 But the whole notion that everything we said is false
23 is -- the exact opposite is true. Mr. Regard said we can look
24 at Tape 6, but it's going to be a waste of time because it's
25 not going to contain SWIFT records from the relevant period.

1 That core proposition has proven to be true.

2 Plus number 2, everything Mr. Radine says is candidly
3 out of context. Your Honor directed us to produce Sullivan
4 Strickler, who is I subcontractor vendor to Mr. Regard, who is
5 an IT expert, who is working with counsel.

6 The actual review process for these documents is
7 hardly just Sullivan Strickler. As Your Honor said, they can
8 ask Sullivan Strickler what they're doing. Sullivan Strickler
9 takes direction from Mr. Regard. He's helping the analysis.
10 Counsel is obviously reviewing records.

11 So the notion that Sullivan Strickler alone is
12 running this process, that's completely false and gives I think
13 gives the entire process a misleading impression.

14 The fact is we're doing what we said we would do. We
15 first tried to convince the Court, I'll admit it, this would be
16 a waste of time.

17 And then finally, we said we don't want to waste any
18 more breadth telling you it's a waste of time. We'll do it,
19 even though we think it's a waste of time.

20 It has proven our point that there's nothing there,
21 but we will finish it. And at that point, Your Honor, I don't
22 expect you on the basis of a phone call to be able to make a
23 decision.

24 If they want to make a motion to compel, which I
25 think is, you know, a waste of time, then fine, we'll make our

1 case, but they should know this is not a one-sided deal.

2 We're candidly sick and tired of being accused of all
3 kinds of discovery malfeasance. And we'll cross-move for cost
4 if it is as I believe it's going to be a baseless motion to
5 compel, but we don't need to resolve that today. We can
6 resolve that after we have finished the rest of the tape
7 recovery process.

8 THE COURT: Mr. Radine suggested that S & S has
9 limited capability on doing tape recovery, but not database
10 recovery. Do you agree with that?

11 MR. BERGER: I don't. They have the ability to
12 search for what is on the tapes. What they're hypothesizing is
13 there data on the tape that is not -- that is a type that isn't
14 conducive to the type of review they're doing.

15 This is one of the preeminent data recovery and
16 analysis firms in the world. They know how to review whatever
17 there is there. And if they don't, then Mr. Regard will add to
18 their capabilities by explaining what we need to do.

19 But no, I don't agree that they're using the wrong
20 methods. I think they're using the right methods for what
21 they're finding on Tape 6.

22 THE COURT: Mr. Radine, why is that wrong?

23 MR. RADINE: I mean, we're not guessing what Sullivan
24 Strickler can do. Mr. Sullivan told us that they don't re-
25 create databases. They just have a program and searches text

1 in the files, opening them like a, you know, sort like a PDF.

2 It's not our view that they can't do this. It's not
3 a disparagement. That's just the role that they play in the
4 market.

5 It's also not our view that they don't know enough
6 about correspondent banking and properly search those records
7 as reflected by the fact that they're only searching one field
8 of all the relevant fields. It's just, you know, what they've
9 told us.

10 We don't have any insight on Sullivan Strickler
11 beyond what Mr. Sullivan had told us. We know he's not working
12 alone. We know he's working with Mr. Regard and that is part
13 of our concern, which is part of why I think the Court directed
14 Mr. Regard not to answer questions for Sullivan Strickler,
15 which we appreciate.

16 But the limits to Sullivan Strickler's capabilities
17 is not a criticism. It's just the role they play as opposed to
18 other forensic firms that have different capabilities including
19 ones that do recovery for banks that's very recent.

20 MR. BERGER: You know, Your Honor, I mean, excuse me,
21 Your Honor, it's Mitchell Berger. If I just may be heard
22 briefly?

23 When we move -- renew our motion to dismiss for lack
24 of jurisdiction, people are going to have to say under oath
25 what the search process was, what they found, what they didn't

1 find. And we don't take that obligation lightly.

2 Our -- we're doing this, understanding at the end of
3 the day, all of this is going to have to be summarized and
4 explained to the Court under oath in affidavits, submit our
5 renewed motion.

6 What I find astonishing is the tone of the six hours
7 of the meet and confers have all be collegial, friendly,
8 helpful.

9 Mr. Scantling has offered some incites. Mr. Sullivan
10 has responded.

11 And then, we get to the lawyers and what I hear is
12 everything that we've done is garbage. And you know, we are
13 providing transparency. This is a complete one-way street.

14 If they have complaints about what we're doing and
15 they want to do it differently, then it's frankly your
16 obligation to tell us that sooner than later and certainly not
17 for the first time when we're on the phone with the Court.

18 THE COURT: Uh-huh. So are you suggesting that a
19 further meet and confer will help resolve the disagreement
20 about database recovery?

21 MR. BERGER: Your Honor, I -- and I just say this as
22 a preface, we had one meet and confer. We already voluntarily
23 provided to them. We'll continue to do that. They said they
24 want to send us additional questions. We're happy to receive
25 those and address those.

1 We're doing, I think, everything that the Court
2 directed us to do. And we're open to doing all of that.

3 But if they think that we can do a better job,
4 despite representing they've told us six hours of meet and
5 confer, fine.

6 Let them tell us because we want to make this process
7 as absolutely water tight as we can, because we already know
8 what it's showing, which is despite all the money and effort
9 that we have already put into it, and all the additional money
10 and effort they want us to put into it, it's not showing
11 jurisdictionally relevant records. They want to use a cannon
12 to kill a flea.

13 This jurisdictional discovery was supposed to be a
14 small set of potentially relevant customers during a small
15 number of years, looking at one thing, transfers to the United
16 States.

17 And it has grown like topsy. And the Plaintiffs are
18 turning this into Jarndyce v. Jarndyce. And there's no reason
19 why this jurisdictional discovery thought process needs to be
20 that way.

21 Let us finish. They don't like it, let them put
22 their stuff in a motion to compel. We'll make our
23 cross-motion. We'll go from there.

24 THE COURT: What's the feeling that Sullivan
25 Strickler can finish their work?

1 MR. BERGER: Your Honor, they'll finish whenever you
2 tell us they can. Mr. Osen at the end of the last meet and
3 confer asked them when they would be finished with this.
4 They -- some back and forth, was essentially by the end of the
5 year.

6 We trust me, we want them to move as quickly as
7 possible. We're tired of this dragging on as well, but that's
8 why I suggested to Your Honor, it's October 17.

9 If you want to have a conference December 1st or
10 whatever's the closest weekday, that is, I haven't looked at
11 the calendar, we can tell you I want them to be done before
12 then.

13 And now that they're done with Tape 6, all they had
14 to do is look at Tape 23 and feel where that leaves them on the
15 other ones.

16 So we want them to be done sooner than the end of the
17 year. They're sort of, you know, give themselves breathing
18 room estimate was by the end of the year.

19 THE COURT: All right, so Mr. Radine, if we
20 gave -- if I gave Sullivan Strickler 30 days basically till
21 just before Thanksgiving and had a conference soon after, would
22 that put you in a position to make your motion to compel if
23 necessary?

24 MR. RADINE: Sure. I mean, we'll move to compel when
25 Your Honor directs us. Sullivan Strickler is not going to

1 develop more capabilities in the next month. And there's a
2 limit to how much we can help them since we can't design their
3 software or, you know, anything like that.

4 So -- and we'll obviously keep participating in this
5 process. We are providing information as fast as we can.

6 The last meet and confer with them we had was on
7 Wednesday on their schedule because they're moving very slowly,
8 so we have to wait for them to be ready and so on.

9 And we will keep helping as much as possible. But
10 they're not going to (indiscernible) capabilities, so you know,
11 we're ready to move to compel. I've explained that.

12 Now if Your Honor would rather wait a month, we'll do
13 it then, whatever Your -- the Court prefers.

14 THE COURT: Well, I think that Mr. Berger's going to
15 be asking for time to complete the Sullivan Strickler. And so,
16 it would make more sense to have that completed at the next
17 conference and then decide whether to move from there.

18 MR. RADINE: Sure, Your Honor. I mean, that's fine
19 with us in the sense that we are fine with Sullivan Strickler
20 doing whatever they work they want to do.

21 We're just of the opinion that this point, it's just
22 a something that they're doing for their own purposes, not
23 Sullivan Strickler, but BOP in the sense that -- and look, if
24 they come back and say find these search Tape 23 and it's full
25 of responsive transaction, so be it.

1 But what they're not going to do is -- I suspect
2 they're not going to say that and what they'll have done in
3 that remaining time is sort of beside the point since they
4 won't have the capacity to restore the database.

5 (Indiscernible) Tape 6, they don't have the schema
6 for either or the software to do that.

7 So, again, in terms of filing the motion later, it's
8 fine. So far, everything Sullivan Strickler has said has
9 further disproven the assertions BOP has made and, you know, I
10 suppose strengthens our brief on that, but I don't think it's
11 changed the shape of discovery. So I'll leave that schedule to
12 the Court.

13 THE COURT: Okay, if there's disagreement as to
14 whether or not Sullivan Strickler can re-create a database, I
15 think we'll know in 30 days whether they can and be able to
16 move on at least hopefully one issue less that's been resolved.

17 So why don't we give Sullivan Strickler to the 17th?
18 Why don't we give them until the 28th of November?

19 MR. BERGER: Yes, Your Honor. This is Mr. Berger.
20 The 28th of November. Understood. And Your Honor, I hope,
21 will give me a standing objection that if I don't respond to
22 every little jab from Mr. Radine, it doesn't mean that I don't
23 disagree with it.

24 We think that actually what's -- this forensic
25 process, this forensically sound process has proven is that our

1 affidavits have been correct.

2 There's a time and place for that. We'll deal with
3 that in the motions, but if November 28th to finish the
4 process, and then, a status conference with Your Honor, sure,
5 whatever at your convenience.

6 THE COURT: December 1st for the conference, is that
7 enough time?

8 MR. BERGER: From Defendant's standpoint, yes,
9 December 1st is fine.

10 MR. RADINE: That's fine for Plaintiffs. I'll just
11 note just for the record that the parties aren't disagreeing as
12 to whether Sullivan Strickler can restore databases. It can't.
13 We're disagreeing as to whether that's forensically necessary
14 just to make sure that that's clear.

15 THE COURT: (Indiscernible.)

16 MR. RADINE: Okay, so December 1st is fine for us.

17 THE COURT: So we'll have a better idea what's
18 forensically necessary by December 1st, correct?

19 MR. BERGER: We think we'll have -- we're happy to
20 lay all of this out to Your Honor in advance of December 1st,
21 so we don't have to take up quite so much of your time on he
22 said, she said. We're perfectly prepared to file a letter with
23 the Court November 28th, November -- whatever it is Your Honor
24 wants to hear from us, which will have something to react to
25 before December 1st. We're happy to help the Court that way.

1 THE COURT: Okay, that makes sense. So why
2 don't -- if you could file something by November 28th? And if
3 Sullivan Stricker could complete its work before then, then I
4 think we'd be in good shape to address these issues on December
5 1st.

6 And I've got time at 2:00 on the 1st, if that works
7 for everyone.

8 MR. BERGER: We're available whenever the Court's
9 available, Your Honor, so that's fine.

10 THE COURT: Okay, anything else we need to discuss?

11 MR. BERGER: You know, because I noticed when I look
12 at the Court's calendar that most matters Your Honor's giving
13 half hour to.

14 And we have proven once again that we will always
15 take up too much of the Court's time and that Your Honor's set
16 an hour for us today, so thank you for that, but we'll try to
17 be more compact in the future.

18 THE COURT: Okay, but I (indiscernible) anyway.

19 MR. RADINE: This is Michael Radine again. Yes, so I
20 don't know how many months it's been since we subpoenaed JP
21 Morgan or that they said they've found records or that this
22 Court now ordered a couple months ago that they produce them to
23 BOP. We still have not heard anything else about JP Morgan.

24 MR. BERGER: I can address that, Your Honor, Mitchell
25 Berger here. We received after Your Honor entered the order

1 and some further pressing of JP Morgan Chase a spreadsheet that
2 contains six transactions.

3 They are dated April 26, 2004 through October 20,
4 2004. And from our standpoint, that is outside the
5 jurisdiction and relevant time period. And therefore, should
6 not have to be produced.

7 THE COURT: All right.

8 MR. RADINE: This is Michael Radine. We'll meet and
9 confer with them. This is the very first we're hearing this
10 update apparently. They have for some time, but we will talk
11 with Defense counsel about that.

12 THE COURT: Okay, good. All right, so we have the
13 dates then. By the 20th, I'll get a letter from BOP. And
14 we'll have a conference at 2:00 p.m. on the 1st of December.

15 MR. BERGER: Thank you, Your Honor.

16 MR. RADINE: Thank you.

17 THE COURT: Thank you.

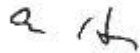
18 MR. BERGER: Bye.

19 THE COURT: Bye.

20 (Proceedings concluded at 2:47 p.m.)
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CERTIFICATE

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

November 1, 2022

Chris Hwang

Date

Court Reporter